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No. 86-525

In the Supreme Court of the United States

OCTOBER TERM, 1986

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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TABLE OF AUTHORITIES

Cases: Page

Carson v. *American Brands, Inc.*, 450 U.S. 79 ..... 3, 4, 5, 6, 7, 8
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 7
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 ..... 7, 8
Donovan v. *Robbins*, 752 F.2d 1170 6
Gabriele v. *Chrysler Corp.*, 573 F.2d 949 9
International House of Pancakes Franchise Litigation, In re, 487 F.2d 303 7
Liberty Mutual Insurance Co. v. *Wetzel*, 424 U.S 737 5
Local 93, Firefighters v. *City of Cleveland*, No. 84-1999 (July 2, 1986) 9
Norman v. *McKee*, 431 F.2d 769, cert. denied, 401 U.S. 912 ..... 4, 8
Richardson-Merrell, Inc. v. *Koller*, No. 84-127 (June 17, 1985) 7
Seigal v. *Merrick*, 590 F.2d 35 8-9
Trans World Airlines, Inc. v. *Thurston*, 469 U.S. 111 .... 2, 3, 9
Western Air Lines, Inc. v. *Criswell*, No. 83-1545 (June 17, 1985) 9

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. II) 621 *et seq.* 1
28 U.S.C. 1291 ..... 2, 4, 5, 7, 8, 9
28 U.S.C. 1292(a)(1) 2, 3, 5, 6, 7, 9

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Petitioner, the defendant in an age discrimination lawsuit, contends that the court of appeals had jurisdiction to entertain its challenge to the district court's rejection of a proposed consent decree.

1. In 1981, the Equal Employment Opportunity Commission (EEOC) brought this action against petitioner, alleging that its employment practices violated the Age Discrimination in Employment Act of 1967 (ADEA or Act), 29 U.S.C. (& Supp. II) 621 *et seq.* In particular, the EEOC challenged petitioner's policies mandating that pilots retire at age 60 rather than displace less senior flight engineers, and preventing pilots who previously had "downbid" to flight engineer positions from serving past age 60. Pet. App. A2 & n.1, A10. The EEOC sought both injunctive relief and back pay. Petitioner in turn brought actions against the unions representing the affected employees, the Airline Pilots Association (ALPA) and the Flight Engineers International Association (FEIA), so that they would be bound in the event that resolution of the case required modification of petitioner's collective bargaining agreements. *Id.* at A2.

In 1983, petitioner and the EEOC entered into a proposed consent decree. The decree required petitioner to modify its employment practices: it obligated petitioner to allow flight engineers to work until age 70 and to permit pilots reaching age 60 to "bump" more junior flight engineers. The agreement also provided for monetary relief for pilots who previously had been forcibly retired at age 60 and did not desire to return and retrain as flight engineers. Pet. App. A2. The district court refused to enter the decree, however, choosing to await this Court's then-pending decision in *Trans World Airlines, Inc.* v. *Thurston* (*TWA*), 469 U.S. 111 (1985), which it expected to clarify the law in this area (see Pet. App. A2-A3). Following this Court's decision in *TWA*, petitioner and the EEOC entered into a modified consent decree.[1] This second decree provided for essentially the same injunctive relief as that offered in the first settlement, but increased the monetary relief to be provided by petitioner. *Id.* at A3, A13-A14.

On October 21, 1985, the district court refused to approve the modified decree (Pet. App. A8-A34). In reviewing the decree, the court "use[d] the standard of fairness, adequacy, and reasonableness" (*id.* at A19). This standard, the court explained, "involves balancing several factors including the strength of plaintiff's case; the risk of continued litigation; the presence of a government participant; and the amount offered in settlement" (*id.* at A20).

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[1] Petitioner appealed the district court's disapproval of the first settlement; while the EEOC took the position that the court of appeals had jurisdiction to entertain the appeal under both 28 U.S.C. 1291 and 1292(a)(1) (see Memorandum of EEOC in Opposition to Motion to Dismiss Appeal 3-11), the EEOC declined to join in that appeal because it believed that the case would be resolved more expeditiously by proceeding immediately to trial (see Pet. App. A16). After this Court's decision in *TWA*, petitioner asked the court of appeals to remand the case to permit modification of the decree. The court granted this request. See *id.* at A3.

Applying this standard, the court found the monetary relief provided by the decree to be inadequate. The court noted that "[c]laimants could potentially recover much more than the Decree presently provides" (Pet. App. A22).[2] The fairness of the $1.5 million provided by the decree thus "turn[ed] on the strength of claimants' underlying claim" (*id.* at A24). The court found that claim directly supported by *TWA*, noting that "[i]n many ways, TWA treated its age 60 pilots more evenhandedly than [petitioner] did" (*id.* at A25; see *id.* at A24-A27). The court also found it unlikely that petitioner would be able to make out a bona fide occupational qualification defense (*id.* at A29). In all, the court found the claimants' likelihood of success high; it therefore held that "[t]he settlement agreement offers claimants inadequate compensation for their years of involuntary retirement" (*id.* at A34).

2. On petitioner's appeal, the court of appeals held that it lacked jurisdiction to entertain petitioner's challenge to the district court's decision (Pet. App. A1-A7).[3] The court explained that, under *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981), an order denying a joint motion for entry of a consent decree is appealable under 28 U.S.C. 1292(a)(1) if three conditions are met: "First, the interlocutory order must have the practical effect of denying an injunction. Second, the order must have 'serious, perhaps irreparable, consequence[s].' Finally, the order must be one that can be 'effectively challenged' only by immediate appeal." Pet. App. A4 (citations omitted).

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[2] The court noted that petitioner's potential liability for back pay through August 1985 amounted to more than $26 million, exclusive of interest, and that petitioner also might be liable for front pay and penalties (Pet. App. A22-A23).

[3] The EEOC did not appeal, taking the position that the district court did not abuse its discretion in refusing to accept the settlement (EEOC C.A. Br. 8-18).

The court held that the appeal here failed to satisfy the first two of these requirements. It reasoned that petitioner had not been denied an injunction because, "[a]lthough the disapproved consent decree clearly involved injunctive relief (primarily the modification of [petitioner's] cockpit staffing policies), that injunctive relief was sought by the *appellee* EEOC, not by [petitioner]" (Pet. App. A4 (emphasis in original)). While the court recognized that the decree would have granted petitioner a sort of injunctive relief by modifying petitioner's collective bargaining agreements to comport with the relief awarded the EEOC, the court explained that "the amendments to the collective bargaining agreement * * * are a kind of 'secondary' injunctive relief, made necessary only by the relief granted to the EEOC and *against* [petitioner]" (*id.* at A5 (emphasis in original)).

The court also held that petitioner had not satisfied the second prong of the *Carson* test—requiring that the challenged order have serious or irreparable consequences—because it did not deny petitioner the opportunity "to settle the case on *any* mutually agreeable terms * * *; [petitioner] is merely being denied the right to settle the case on the *particular* terms of the current proposed consent decree" (Pet. App. A6 (emphasis in original)).

The court of appeals also held that petitioner could not ground its appeal on 28 U.S.C. 1291. It acknowledged that Ninth Circuit precedent permitted defendants to proceed under that provision in challenging orders disapproving consent decrees. Pet. App. A6 n.7 (citing *Norman* v. *McKee*, 431 F.2d 769, 772-774 (9th Cir. 1970), cert. denied, 401 U.S. 912 (1971)). But the court noted that *Carson* explicitly resolved a circuit conflict concerning the appealability of interlocutory orders disapproving consent decrees, and cited *Norman* as one of the conflicting cases. The court therefore concluded that "*Carson* was clearly in-

tended to provide a definitive basis and standard for such interlocutory appeals, and thus overrules *Norman* v. *McKee*'s reliance on section 1291" (Pet. App. A7 n.7).

3. a. Whether a *defendant* may proceed under 28 U.S.C. 1292(a)(1) in challenging a district court's refusal to enter a consent decree is a close question that is not directly controlled by *Carson*, which involved a plaintiff's appeal from such a ruling. Several factors support the court of appeals' holding that such an appeal is improper. The usual rule is that Section 1292(a)(1)—which grants the courts of appeals jurisdiction over appeals from interlocutory orders "refusing * * * injunctions"—authorizes an appeal only by the plaintiff, the party that seeks and is "refus[ed]" the injunction. See *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 744-745 (1976). Here, the EEOC brought suit; it was the EEOC, rather than petitioner, that sought injunctive relief and that was effectively denied that relief when the district court refused to enter the consent decree. See *Carson*, 450 U.S. at 83-84.

On the other hand, the *Wetzel* rule may not be fully applicable in the consent decree context. Defendants, of course, usually oppose the award of injunctive relief. When the defendant enters into a consent agreement, however, it is inviting the imposition of an injunction, both as the condition upon which the litigation will be terminated and to insulate its actions from further challenge. In that setting, it is at least arguable that the district court's refusal to approve the consent agreement involves the "denial of an[] injunction sought by" the defendant. *Wetzel*, 424 U.S. at 745.

It also is a close question whether petitioner's appeal satisfies the second, "irreparable injury" prong of the *Carson* standard. There is language in *Carson* suggesting that a party suffers such injury whenever it "lose[s] [its] opportunity to settle the case on the negotiated terms."

450 U.S. at 86. Petitioner certainly has suffered such a loss. At the same time, however, the Court emphasized that the district court in *Carson* had rejected the settlement agreement because it believed that no race-conscious injunctive relief could be awarded on the facts presented, given the failure to show present or past discrimination (*id.* at 82).[4] The district court accordingly had "ordered the parties to proceed to trial and to have their respective rights and liabilities established within limits laid down by that court." *Id.* at 87 (footnote omitted); see *id.* at 87 n.12. In contrast, as the court of appeals explained, in this case "the district court's ground for disapproving the decree is not nearly so broad," and "in no way inhibits further negotiations between the EEOC and [petitioner] to meet the concerns raised" (Pet. App. A6). Petitioner thus has not been entirely deprived of its opportunity to settle the case.[5]

While the applicability of Section 1292(a)(1) when the defendant appeals the disapproval of a consent decree thus involves difficult questions, those questions do not, in our view, require consideration by the Court at this time. The

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[4] The district court further held that even such a showing would justify race-conscious relief only for the benefit of persons who were themselves the victims of discrimination. 450 U.S. at 82.

[5] Moreover, *Carson* presented a second form of irreparable injury that has not been suffered by petitioners here—the denial of immediate injunctive relief to plaintiffs who were forced to work in a discriminatory setting. See 450 U.S. at 89 & n.16. The same sort of injury was inflicted by the district court's disapproval of a consent agreement in *Donovan* v. *Robbins*, 752 F.2d 1170 (7th Cir. 1985), upon which petitioner relies (Pet. 14). In that case, which involved a suit to correct the mismanagement of pension funds, the court of appeals found an appeal (by both the plaintiff and the defendants) proper because the district court's decision meant that "[t]he coming into effect of equitable provisions designed to protect the pension rights of thousands of workers would be delayed for a long time—perhaps forever." 752 F.2d at 1176.

decision below is the first post-*Carson* ruling to consider the issue.[6] And the question is unlikely to arise often. In many cases, both parties—who freely chose to enter into the settlement agreement after assessing the strengths of their respective litigation positions (see generally *Carson*, 450 U.S. at 86-87)—will have an interest in pursuing an appeal. Because appellate jurisdiction will exist whenever the plaintiff takes an appeal, it will be irrelevant whether the defendant could have proceeded on its own under Section 1292(a)(1). In these circumstances, there is no need for the Court to review a decision providing a plausible answer to a novel legal question.

b. The correctness of the holding below that the district court's order cannot be challenged on appeal under 28 U.S.C. 1291 also is open to dispute. As this Court recently explained, a district court's ruling may be appealed as a collateral order under the doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), if it satisfies three conditions: "It must 'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.' " *Richardson-Merrell, Inc.* v. *Koller*, No. 84-127 (June 17, 1985), slip op. 6 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). The district court's order here may satisfy all of these conditions.

There is little doubt that the district court's disapproval of the consent decree "conclusively determine[d] the disputed question"—whether the case would be settled on the negotiated terms. There was nothing "inherently tentative" about the order (*Coopers & Lybrand*, 437 U.S. at

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[6] The only pre-*Carson* decision permitting a defendant to appeal the disapproval of a plea agreement appears to be *In re International House of Pancakes Franchise Litigation*, 487 F.2d 303 (8th Cir. 1973). And that decision, as this Court has noted, contained "no discussion of [the] jurisdictional question." *Carson*, 450 U.S. at 83 n.6.

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469 n.11); the district court made it plain that it would not approve the decree without a substantial modification of the monetary relief (see Pet. App. A34). Compare *Coopers & Lybrand*, 437 U.S. at 469 & n.11. It is also arguable that the issue resolved in the challenged order should be viewed as separate from the merits: while "[c]ourts judge the fairness of a proposed [settlement agreement] by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement," they "do not decide the merits of the case or resolve unsettled legal questions." *Carson*, 450 U.S. at 88 n.14.[7] And as this Court has noted, refusal to accept a settlement cannot be reviewed effectively after a trial on the merits (*ibid.*).

Given these considerations, the Ninth Circuit, prior to its decision in this case, had held that a district court's refusal to approve a settlement is appealable under Section 1291. *Norman* v. *McKee, supra.* The court below departed from this approach only because it concluded that *Norman* had been effectively overruled by this Court's decision in *Carson* (Pet. App. A7 n.7). But the correctness of this conclusion is open to dispute, since *Carson* itself expressly declined to decide whether Section 1291 is applicable in such circumstances. 450 U.S. at 83 n.7.

Again, however, in our view the question of the applicability of Section 1291 to the order here does not warrant consideration by the Court. Whether or not the court of appeals was correct in its reading of *Carson*, the court's refusal to follow *Norman* eliminated a conflict in the circuits on the appealability under Section 1291 of orders disapproving settlement agreements. See *Seigal* v.

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[7] It undoubtedly is true, however, that the district court's analysis of a proposed settlement involves consideration of the merits of the plaintiff's claim. Compare *Coopers & Lybrand*, 437 U.S. at 469 & n.12.

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Merrick, 590 F.2d 35 (2d Cir. 1978) (holding such orders not appealable under Section 1291). And after this Court's decision in *Carson*, the issue is unlikely to arise with any frequency because, as we note above, plaintiffs may routinely challenge such orders under Section 1292(a)(1). The correctness of the court of appeals' resolution of this narrow issue accordingly is not the sort of question that requires resolution by this Court, at least in the absence of a conflict in the circuits.

c. An additional prudential consideration also counsels against the Court's review of the decision below. Given this Court's decisions in *TWA* and *Western Air Lines, Inc.* v. *Criswell*, No. 83-1545 (June 17, 1985),[8] we cannot say that the district court abused its discretion in holding that the settlement agreement undervalued the strength of the discrimination claim.[9] The court of appeals therefore could be expected to affirm the district court's ruling were it to reach the merits of petitioner's appeal. Because "[t]he need for quick dispute resolution is acute in the ADEA context" (*Gabriele* v. *Chrysler Corp.*, 573 F.2d 949, 954 (6th Cir. 1978)), the likelihood that petitioner could not ultimately prevail militates against review in this case, even if the jurisdictional issue presented by petitioner otherwise warranted the Court's consideration.

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[8] In *TWA*, the Court held that the ADEA was violated by an airline policy that made it impossible for certain pilots to become flight engineers after turning 60. In *Criswell*, the Court rejected a claim that an airline policy forcing flight engineers to retire at age 60 established a bona fide occupational qualification.

[9] We do not understand ~~that~~ this Court's opinion in *Local 93, Firefighters* v. *City of Cleveland*, No. 84-1999 (July 2, 1986), which discusses the "dual character" of consent decrees as contracts and judicial decrees and holds that they are not encompassed within the term "order[s] of the court" as used in Section 706(g) of Title VII (slip op. 16-21), to alter in any way the standards under which district courts are to review consent decrees.

It is therefore respectively submitted that the petition for a writ of certiorari should be denied.

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